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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1042

ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,
Petitioners,
against
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,
Petitioners,
against
HONORABLE EDMUND L. PALMIERI, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

None of the three opinions of the District Court is as yet reported, but copies of all those opinions are annexed as part of the Appendix to the Petition (Appendix A, pp. 7a-22a). The *per curiam* opinion of the Court of Appeals is reported at 340 F.2d 160, and is also annexed as part of the Appendix to the Petition (Appendix A, pp. 1a-4a).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

Respondents cannot agree with the "Questions Presented" as stated by petitioners in their Brief (pp. 3-4). In particular, respondents do not agree that petitioners' question (2a) is presented at this stage of this litigation. Respondents' formulation of the questions presented to this Court by the Petition is as follows:

1. As to the dismissal of the appeal to the Court of Appeals (first case):

Whether an interlocutory order of the District Court which stays a civil anti-trust case involving two regulated air carriers until the plaintiff has exhausted its available remedies before the Civil Aeronautics Board is appealable under 28 U. S. C. Section 1292(a)(1), which makes appealable interlocutory orders granting, continuing, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.

2. As to the denial by the Court of Appeals of a writ in the nature of mandamus (second case):

Whether in granting the stay order the District Court judge committed clear abuse of discretion or usurpation of judicial power, and whether the statutory restriction placed upon appealability of interlocutory orders may be circumvented by petitions for writs of mandamus.

Statutes Involved

The only statute pertinent to the question of appealability raised in the first case is 72 Stat. 1770, 28 U. S. C.

§1292(a)(1), set out in Appendix B to the Petition (p. 1b). The only pertinent statute with respect to the question of the denial of a writ of mandamus involved in the second case is the All Writs Act, 62 Stat. 944, as amended by 63 Stat. 102, 28 U. S. C. §1651, also set forth in Appendix B to the Petition (p. 6b).

Statement

In the complaint, filed on January 8, 1964 in the United States District Court for the Southern District of New York (R B, 1)*, the plaintiffs, Allied Air Freight, Inc. and Allied Air Freight International Corp. (hereinafter collectively called Allied), set forth two causes of action against the defendant, Pan American World Airways, Inc. (hereinafter called Pan American), viz., (a) a Clayton Act claim for treble damages for Pan American's alleged violations of §§1 and 2 of the Sherman Act in agreement, combination and conspiracy with one Add Airfreight Corp., an air freight forwarder in direct competition with Allied, and (b) a federal tort claim for single damages based on Pan American's alleged unilateral violation of §404 of the Federal Aviation Act of 1958 (49 U. S. C. §1374) in discriminating, as an air carrier engaged in the actual operation of cargo carrying aircraft, against its would-be customer, Allied.

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* References are to pages of the records herein. In the first case, the appeal to the Court of Appeals, the record consists of two parts, separately certified and paginated, viz., the papers brought up from the District Court, and the record of proceedings in the Court of Appeals in that appeal. Since the latter consists only of the notices of motion in the appeal, the opinion of the Court of Appeals and its formal order, that portion of the record is designated herein as "RA", while the District Court record is designated as "R".

The record in the second case, an application for mandamus originating in the Court of Appeals, is designated as "RM".

By notice of motion dated March 10, 1964 (R 17; RM 23), Pan American moved in the District Court to stay the action until such time as the Civil Aeronautics Board (hereinafter called C.A.B.) has had an opportunity to exercise its primary jurisdiction by making findings relative to the allegations of the complaint. In the belief that the nature of plaintiffs' allegations are such that the C.A.B. should have an opportunity to decide whether it may wish to consider them, Honorable Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York, decided on May 22, 1964 in a written opinion discussing the authorities in the primary jurisdiction area (Appendix A, pp. 7a-15a) that the "action should be stayed until the plaintiff [Allied] exhausts its available remedies before the CAB." (Appendix A, p. 15a). In the settlement of the Court's order of June 1, 1964 to that effect (R 125, 126; RM 57, 58), Judge Palmieri denied Allied's application for a discretionary appeal certificate, finding that the criteria for certification under 28 U. S. C. §1292(b) had not been met (R 178-181; RM 56, Exhibit E, pp. 1-4) and endorsed on the order a memorandum opinion dated June 2, 1964 (Appendix A, p. 18a).

On June 19, 1964, Allied moved for reargument, praying vacatur of the stay or, in the alternative, for the grant of a discretionary appeal certificate pursuant to 28 U. S. C. §1292(b) (R 132-133; RM 60-61). Judge Palmieri granted the petition for reargument but denied the motion to vacate the June 1, 1964 order and again denied the application for a certificate (Appendix A, pp. 19a-22a).

On June 3, 1964, Allied filed a Notice of Appeal to the Court of Appeals for the Second Circuit from the order of June 1, 1964 (R 128, 129). Pan American moved to dismiss the appeal on the ground that the order was non

appealable (RA 1, 2). Allied then filed an original application for writ of mandamus, conditioned on the dismissal of the appeal, directing Judge Palmieri to vacate the stay order from which its appeal was taken (RM 1-13).

Both the motion to dismiss the appeal and the mandamus application came on to be heard before Judges Waterman, Moore and Kaufman on December 7, 1964, and the Court below, on January 13, 1965, issued a *per curiam* opinion (Appendix A, pp. 1a-4a; 340 F.2d 160) dismissing the appeal for lack of appellate jurisdiction and denying the application for mandamus. Allied has now filed a petition for a writ of certiorari to review the judgment of that Court of January 13, 1965 (Appendix A, pp. 5a, 6a).

ARGUMENT

I

The Court of Appeals correctly decided that the stay order of the District Court was not an appealable interlocutory order under §1292(a)(1) of the Judicial Code.

The single question before the Court of Appeals for the Second Circuit concerning Pan American's motion to dismiss Allied's appeal from the District Court stay order was whether that order, concededly interlocutory, was nevertheless appealable as an injunction within the purview of §1292(a)(1) of the Judicial Code (28 U. S. C. §1292(a)(1)). Section 1292(a)(1) gives the Courts of Appeals appellate jurisdiction of

> "Interlocutory orders of the district courts of the United States * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving

> injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. * * *"

The question of appealability was, of course, argued and determined without reference to the substantive merits of the determination appealed from.

In deciding that the interlocutory stay of the pending civil action was not the equivalent of an interlocutory injunction for 28 U. S. C. §1292(a)(1) appeal purposes, the Court of Appeals merely followed this Court's well-established precedents. This Court has at all times narrowly construed this statutory exception to the general rule denying appellate jurisdiction prior to final judgment, stating that "* * * piecemeal appeals have never been encouraged," *City of Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 258 (1949), and that "* * * Congress has long expressed a policy against piecemeal appeals." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176, 178 (1955).

The leading case on the appealability of stay orders under §1292(a)(1) is *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 (1935). There, the defendant moved to stay plaintiff's action to recover the proceeds of a life insurance policy pending the prior trial of a counterclaim for cancellation of the policy for fraud. The defendant's motion was granted, and plaintiff sought an appeal. This Court held that, on the facts stated in that case, the Court of Appeals had jurisdiction over the appeal because the stay was the granting of an injunction within the meaning of §1292(a)(1).

Although there had been partial merger of law and equity in the federal courts at the time, this Court viewed the stay as having been issued by a court of equity to enjoin a court of law since the action being stayed was

historically legal and the defense being asserted was historically equitable. Thus, this Court drew the line between appealable and nonappealable stays on the basis of the historical nature of the actions involved. Stay orders that would have been equity injunctions staying actions at law were appealable; all other stays were not. In addition, mere stays of proceedings, based on the inherent power of any court to control the progress of the case before it, were not appealable regardless of the nature of the underlying actions or proceedings. This Court said in *Enelow*:

> "[Section 1292(a)(1)] contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of [§1292(a)(1)]." (293 U. S. at 381, 382).

The *Enelow* decision was subsequently reaffirmed in *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), after the complete merger of law and equity in the federal courts. In *City of Morgantown, W. Va.* v. *Royal Ins. Co.*, 337 U. S. 254 (1949), the *Enelow* doctrine was reaffirmed and this Court made it clear that only stays which conformed to the rule of *Enelow* are appealable. It held that a refusal to stay an action for reforma-

tion of an insurance policy (an historically equitable proceeding) so that a counterclaim for recovery on the policy might be tried was nonappealable under §1292(a)(1) because the case did not involve the stay of a legal action in order to allow a proceeding in equity to go forward.

Baltimore Contractors, Inc. v. *Bodinger*, 348 U. S. 176 (1955), is the most recent pronouncement of policy by this Court on the subject of the appealability of stay orders. There a District Court had refused to stay an equitable action for an accounting in order to allow an arbitration to go forward. This Court held that the denial of such a stay was not appealable, and reaffirmed the two basic criteria laid down in *Enelow* for determining the appealability or non-appealability of stays.

It stated:

> "[The order of the District Court] was a mere order and not an injunction as that word is understood through the *Enelow* and the *Ettelson* cases as a stay through equitable principles of a common-law action. * * *" (p. 184)

It stated further:

> "The point was made in the *Enelow* case that power to stay mere steps within the framework of the litigation before a court differs as to appealability from an injunction prohibiting proceedings in another court. * * *" (p. 183)

The decisions of the Courts of Appeals are wholly in accord with this formulation, i.e., an interlocutory order is only appealable under §1292(a)(1) if it stays (or refuses to stay) a legal action to allow trial of an equitable defense or counterclaim. See, *e.g.*, *Jackson Brewing*

Co. v. *Clarke*, 303 F.2d 844 (5th Cir. 1962); *Korody Marine Corp.* v. *Minerals & Chemicals Phillipp Corp.*, 300 F.2d 124 (2d Cir. 1962); *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961), *cert. denied* 368 U. S. 986; *Chronicle Publishing Co.* v. *National Broadcasting Co., Inc.*, 294 F.2d 744, 746 (9th Cir. 1961); and *Day* v. *Pennsylvania R.R. Co.*, 243 F.2d 485, 487 (3d Cir. 1957).

Applying the *Enelow* rule to the instant case, the Court below correctly dismissed Allied's appeal. Although Judge Palmieri's order stayed a legal action, clearly it did not do so to allow the prior trial of an equitable defense or counterclaim or, indeed, for any reason involving the court's equity power. On the contrary, that order merely postponed trial of the suit until after action by the C.A.B.

Respondents have found no case, and petitioners cite none in their brief, which, since the rule of *Enelow* was formulated by this Court, has held appealable an order granting or refusing a stay of an action in order to allow a federal administrative agency to exercise its primary jurisdiction. In fact the courts have unanimously held that such orders are not appealable, refusing to equate an administrative proceeding with what was historically an equity proceeding. See *Chronicle Publishing Co.* v. *National Broadcasting Co., Inc.*, 294 F.2d 744 (9th Cir. 1961); *New York, N.H. & H. R.R. Co.* v. *Lehigh & New England Ry. Co.*, 287 F.2d 678 (2d Cir. 1961); *United Gas Pipe Line* v. *Tyler Gas Serv. Co.*, 247 F.2d 681 (5th Cir. 1957); *Day* v. *Pennsylvania R.R. Co.*, 243 F.2d 485 (3d Cir. 1957); *American Airlines, Inc.* v. *Forman*, 204 F.2d 230 (3d Cir. 1953), *cert. denied* 346 U. S. 806; and *Beckhardt* v. *National Power & Light Co.*, 164 F.2d 199 (2d Cir. 1947).

Petitioners seek to avoid the applicability of the rule of *Enelow* by equating administrative proceedings with

arbitration proceedings. This attempted analogy is not apt and was specifically rejected by the Court of Appeals for the Third Circuit in *Day* v. *Pennsylvania R.R. Co.*, 243 F.2d 485 (3d Cir. 1957), distinguishing *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U. S. 449 (1935).

Petitioners further attempt to avoid the unbroken line of cases holding that orders granting stays pending administrative decisions are nonappealable by arguing that in the previously decided cases another related proceeding was already pending while in the present case no such proceeding has yet been commenced. In *Day* v. *Pennsylvania R.R. Co.*, 243 F.2d 485 (3d Cir. 1957), however, no proceedings before the National Railroad Adjustment Board were pending *between the parties*. Rather the action between the parties was stayed pending the determination by the Board of cases between *other* claimants and the defendant involving like issues. Also, in *American Airlines, Inc.* v. *Forman*, 204 F.2d 230 (3d Cir. 1953), *cert. denied* 346 U. S. 806, a case which, like the case at bar, involved assertion of the primary jurisdiction of the C.A.B. in an action among regulated air carriers, the District Court's refusal of a stay was held not to be appealable, although no action was then pending between the parties before the C.A.B.

Thus, the actual pendency of another proceeding between the parties is irrelevant in determining whether the stay by a District Court of the proceedings before it constitutes the granting of an injunction, and rightly so. Clearly an order granting a stay pending administrative action is as much the exercise of control over the progress of the litigation where administrative proceedings have not yet been commenced, as where they are already pend-

ing. In both instances the court is exercising its control to give the administrative agency an opportunity to exercise its primary jurisdiction.

The dismissal by the Court below of petitioners' attempted appeal from the District Court's order was correct for a second reason. The order of the District Court was solely an exercise of the Court's inherent power to manage the course of the litigation before it. Under the *Enelow* rule such administrative "docket" orders have never been held to be appealable. See, *e.g.*, *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176, 183 (1955). Accordingly, the Court below followed the precedents of this Court in declaring:

> "This type of docket order in a case which defers action for the time being is not an injunction order contained within an interlocutory order at law such as to permit an appeal from the granting or the denial of an injunction pursuant to 28 U. S. C. §1292(a)(1). See 6 Moore, Federal Procedure §54.07 at p. 48. Such an order is only a step in the action." (Appendix A, p. 3a; 340 F.2d at 161)

II

The Court of Appeals properly denied Allied's petition for mandamus as an unfounded and unwarranted attempt to circumvent the statutory restrictions placed upon appealability of interlocutory orders.

Conditioned upon the Court of Appeals granting Pan American's motion to dismiss Allied's appeal, Allied petitioned that Court to issue an order in the nature of a writ of mandamus directing Judge Palmieri to vacate the stay order from which Allied's appeal was taken.

While Courts of Appeals under §1651(a) of the Judicial Code (28 U. S. C. §1651(a)) may issue writs of mandamus in appropriate cases, this Court has consistently held that mandamus is an extraordinary remedy to be used reluctantly and only in cases where it is beyond dispute that the trial court has arbitrarily failed to exercise its functions or has sought to exercise jurisdiction which it does not possess. In the leading case this Court stated that mandamus "is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power'. * * *" *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 383 (1953). Accord: *Republic of Iraq* v. *First Nat. City Bank*, 313 F.2d 194 (2d Cir. 1963); *Ward Baking Co.* v. *Holtzoff*, 164 F.2d 34 (2d Cir. 1947). None of the cases cited by petitioners dispute the applicability of this standard.

As the Court below necessarily found in applying the standard of *Bankers Life* herein, there was neither abuse of discretion nor usurpation of power by Judge Palmieri. Indeed, petitioners have nowhere claimed that Judge Palmieri has been guilty of usurpation of power, arbitrary action or obvious disregard of the law. The gravamen of their complaint against him is that they think he was wrong in his decision on defendant's motion. By their "matched appeal and conditional application for mandamus" (Pet. Brief p. 32)—in a situation where their repeated attempt to resort to §1292(b) before the District Court gave evidence of their own belief that the order was not appealable—petitioners seek merely to circumvent the statutory restrictions upon appellate review of interlocutory orders. Such attempted use of petitions for mandamus have become all too commonplace. The Court of Appeals for the Second Circuit has consistently, and cor-

rectly, refused to countenance this attempted undermining of the "final judgment" rule by giving short shift to frivolous mandamus petitions such as that herein. In doing so it has followed this Court's mandate in *Bankers Life*, where it was stated:

> "* * * it is established that the extraordinary writs cannot be used as substitutes for appeals, * * * even though hardship may result from delay and unnecessary trial * * *" *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 383 (1953).

Nor should a Court of Appeals issue a writ of mandamus merely to avoid inconvenience or delay which might be caused a plaintiff by refusing to allow an appeal from an interlocutory order where certification by the District Judge has been denied under §1292(b). In *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943), a Court of Appeals had issued a writ of mandamus directing the District Court to reinstate the defendants' plea in abatement to an indictment for violation of the Sherman Act and to try the issues of fact thus raised. The Supreme Court reversed, holding that the Court of Appeals had erred in directing that mandamus issue. Responding to defendants' contention—that the inconvenience of requiring them to undergo trial in advance of an appellate determination of their challenge to the validity of the indictment made mandamus appropriate—the Court said:

> "* * * We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. *Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its*

> *discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.*" 319 U. S. at 30. (Emphasis added.)

Accord: *Ex Parte Fahey*, 332 U. S. 258 (1947); *Norte & Co.* v. *Defiance Industries, Inc.*, 319 F.2d 336 (2d Cir. 1963); *Abrams* v. *McGohey*, 260 F.2d 892 (2d Cir. 1958); *Alcoa S.S.* v. *Ryan*, 211 F.2d 576 (2d Cir. 1954).

Following the aforesaid precedents established by this Court and elaborating upon the criteria of "abuse of discretion or usurpation of judicial power", the Court of Appeals for the Third Circuit, per Judge Hastie, has stated the test for determining the availability of mandamus to review a jurisdictional ruling of a District Judge as follows:

> "The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error. * * *" *American Airlines, Inc.* v. *Forman*, 204 F.2d 230, 232 (3d Cir. 1953), *cert. denied* 346 U. S. 806.

This test has also been adopted by the Courts of Appeals for the Fourth and Seventh Circuits. *Holub Industries, Inc.* v. *Wyche*, 290 F.2d 852 (4th Cir. 1961); *General Tire & Rubber Co.* v. *Watkins*, 326 F.2d 926 (4th Cir. 1964); *Comfort Equipment Co.* v. *Steckler*, 212 F.2d 371 (7th Cir. 1954).

In *American Airlines* defendants had petitioned for a writ of mandamus to restrain the District Court from going forward with the trial of an antitrust action on the ground that the court could not adjudicate the controversy without unlawfully encroaching upon the primary jurisdiction of the regulatory agency.

Applying its test to the facts, the Court of Appeals for the Third Circuit found that:

> "Thus tested, the present case is obviously inappropriate for a peremptory writ. The court has neither ignored nor refused to follow any clear dictate of the law. The case is one of an increasing number where a rather involved problem of possible conflict of jurisdiction between a court and an administrative agency must be solved. If the circumstances were plainly comprehended by a statutory directive that resort be first to the administrative agency, the assumption of jurisdiction by a court would be a usurpation of power properly checked by an extraordinary writ. But such clear cases aside, there often is need as here for judicial appraisal of the less than apparent interrelation of legislation under which it is argued that primary resort should be to an administrative tribunal and other provisions of law which standing alone would empower a court to proceed forthwith. The language, structure and legislative history of statutes must be examined. Relevant judge made doctrine must be considered. The interplay of these factors must be rationalized. The facts before the court must be analyzed in relation to the legal rationalization. If, after exercising professional skill and judgment in working through a process of this sort a court decides, rightly or wrongly, that it has jurisdiction, it is most unlikely that the judge will have merited that peremptory admonition which is reserved principally for cases of abuse or gross misuse of power." (204 F.2d at 232)

The instant case was similarly inappropriate for the issuance of a writ of mandamus. Judge Palmieri's opinions herein clearly indicate that he considered with great care in the light of the statutes and the precedents (with the benefit of extensive briefing and oral argument by both sides) whether primary recourse to the C.A.B. should be prerequisite to the establishment of petitioners' claim (Appendix A, pp. 7a-15a, 19a-22a). His ruling that the action below should be stayed until the petitioners exhaust their available remedies before the C.A.B. is supported by "rational and substantial legal argument": it was reached through the exercise of "professional skill and judgment." It cannot be said that there was such clear "abuse or gross misuse of power" by Judge Palmieri as would render the case appropriate for mandamus.

Petitioners contend, however, that a stay granted by a District Court to permit the exercise of primary jurisdiction by an administrative agency stands in a special light because unless mandamus issues to review such a stay the Court's determination will never be reviewable. On this basis they suggest that the standard for determining the availability of mandamus to review a jurisdictional ruling must be different where a District Court grants such a stay from where it refuses to grant a stay. Such a contention, particularly as applied to this case, is absurd. As the Court below stated:

> "Obviously, the stay order, as well as not adjudicating upon plaintiffs' claims, does not finally dispose of the district court suit or necessarily preclude a sometime trial in that forum of plaintiffs' claims. The order below only provides that the case is not to be brought forward on the docket until the Board is given an opportunity to consider what, if any, attention it may accord the litigation, and has ex-

hausted that opportunity." (Appendix A, p. 3a; 340 F.2d at 161.)

Therefore, the stay order in no way defeats the appellate jurisdiction of the Court of Appeals, and sooner or later the case can come up through normal appeal channels at which time the correctness of Judge Palmieri's order will be appropriate for review by the Court of Appeals.

Petitioners devote a major portion of the section of their Brief dealing with mandamus (pp. 19-29) to a reargument, on the merits, of the substantive questions which were before Judge Palmieri on defendant's motion for a stay. Respondents contend, of course, that Judge Palmieri was completely justified, on the law and on the facts, in staying the instant action until plaintiffs had exhausted their administrative remedies before the C.A.B. for all the reasons set forth in his several opinions (Appendix A, pp. 7a-15a; 18a-22a). However, respondents believe that reargument of the substantive questions determined by Judge Palmieri is not appropriate at this stage of the case because the standard for determining the availability of mandamus is whether the District Judge has committed gross abuse of discretion or usurpation of judicial power. "If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error. . . ." *American Airlines, Inc.* v. *Forman*, 204 F.2d 230, 232 (3d Cir. 1953), *cert. denied*, 346 U. S. 806. Accordingly, in order not to burden this Court unnecessarily with arguments on questions not presented to it at this time, respondents make no answer herein to the arguments contained in the aforementioned pages of petitioners' Brief under the heading "Primary Jurisdiction".

III

There are no serious questions raised by the decision of the Court below which warrant review by this Court.

The decision of the Court below, both in dismissing the appeal and in denying mandamus, followed clearly established precedents of this Court and raised no important questions of federal law which have not been, or should be, settled by this Court. The decision is not in conflict with any decision of any other Court of Appeals. Moreover, the Court below has not in any way departed, or allowed the District Court to depart, from usual and accepted judicial proceedings. Thus, no exercise of this Court's power of supervision is called for.

With respect to the dismissal of the appeal, petitioners advance two grounds upon which they would have this Court review the decision below. First, they state that this Court should now decide whether an administrative proceeding can be equated with an equitable defense or counterclaim in applying the *Enelow* rule. No court has ever before intimated that such an equation can be made. Indeed, as pointed out at page 9, *supra*, the six Court of Appeals cases that have considered this question (in four different Circuits) have unanimously held that administrative proceedings should not be deemed equitable defenses or counterclaims for this purpose.

Secondly, petitioners argue that this Court should grant review because Judge Palmieri's order "differs from a conventional injunction only in that compliance is motivated by the desire of the suitors to save their suit rather than an unnecessary contempt sanction" (Pet. Brief, p.

18). But compliance with any Court's order staying proceedings pending before it is so motivated, and this Court has already set forth in *Enelow*, *Ettelson*, *City of Morgantown*, *Baltimore Contractors*, and other cases the rules which are to be followed in determining whether such stay orders are appealable injunctions under Section 1292(a)(1). No further clarification is required.

On the question of the availability of mandamus, petitioners state two reasons why this Court should review the decision of the Court below. First, they state that "an important question of federal law exists with respect to" the alleged refusal by the Court below to review the merits of the decision by Judge Palmieri (Pet. Brief, pp. 32-33). Leaving aside the question of whether it may fairly be assumed from the decision of the Court below that it did not review the merits, respondents contend that the substantive questions of law determined by Judge Palmieri in issuing his order were not appropriately before the Court below on any issue.

The second question submitted by the petitioners for review by this Court with respect to the denial of mandamus is "whether the Court of Appeals was bound by the applicable decisions of this Court to issue mandamus" (Pet. Brief, p. 33). Respondents believe, however, that they have demonstrated in Part II, *supra*, that the denial of mandamus by the Court below was in complete conformity with, and in fact dictated by, the applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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